IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

J.D. ECKMAN, INC.   :   CIVIL ACTION
                                     :
        v.   :
                                     :
STARR INDEMNITY & LIABILITY   :
COMPANY   :   NO. 23-1361

MEMORANDUM

Bartle, J.   August 31, 2023

        Plaintiff J.D. Eckman, Inc., a highway construction
company, seeks a declaratory judgment against one of its
insurers, defendant Starr Indemnity & Liability Company.
Plaintiff asks the court to declare that defendant's
second-layer excess insurance policy provides for $4 million of
liability coverage per construction project, without limit to
the number of projects, during the policy period. Defendant,
however, maintains that the policy has an aggregate $4 million
limit regardless of the number of projects. Before the court is
the motion of the defendant to dismiss plaintiff's complaint for
failure to state a claim under Rule 12(b)(6) of the Federal
Rules of Civil Procedure.

                                I

        When reviewing a motion to dismiss under Rule
12(b)(6), the court "accept[s] as true all allegations in
plaintiff's complaint as well as all reasonable inferences that
can be drawn from them, and [the court] construes them in a

light most favorable to the non-movant." Tatis v. Allied

Interstate, LLC, 882 F.3d 422, 426 (3d Cir. 2018) (quoting

Sheridan v. NGK Metals Corp., 609 F.3d 239, 262 n. 27 (3d Cir.

2010)).

The court is generally limited to allegations set

forth in the pleadings. See Pennsylvania ex rel. Zimmerman v.

PepsiCo, Inc., 836 F.2d 173, 181 (3d Cir. 1988). Our Court of

Appeals explained that it is proper to consider "matters

incorporated by reference or integral to the claim, items

subject to judicial notice, matters of public record, orders,

[and] items appearing in the record of the case." Buck v.

Hampton Twp. Sch. Dist., 452 F.3d 256, 260 (3d Cir. 2006)

(citing 5B Charles Allen Wright & Arthur R. Miller, Federal

Practice and Procedure § 1357 (3d ed. 2004)); Pension Benefit

Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196

(3d Cir. 1993) (citing 5A Charles Allen Wright & Arthur R.

Miller, Federal Practice and Procedure § 1357 (2d ed. 1990)).

Thus, the court may consider the terms of relevant insurance

policies.

II

Plaintiff purchased four commercial general liability

policies--one primary policy and three excess policies--for the

policy period of January 1, 2018 through January 1, 2019.

These policies include per occurrence limits which cap the coverage provided for a single case or incident. They also include aggregate limits which cap the total coverage an insurer will provide during the policy period. What these aggregate limits are is the focus of the pending motion.

According to the complaint, plaintiff faces eight lawsuits related to a July 2018 vehicle accident at its I-83 highway construction project in Dauphin County, Pennsylvania. There were three fatalities as well as other injuries. Plaintiff is also the defendant in two cases involving its I-78 project in Berks County, Pennsylvania where two individuals were killed and two were injured, also in July 2018. Defendant, in response to plaintiff's request for coverage, stated that there is a limit of $4 million in total for all these claims.

Arch Insurance Company ("Arch") issued plaintiff's primary insurance policy. The policy contains a $1 million occurrence limit and a $2 million aggregate limit per construction project without any limit to the number of projects during the policy period. The policy states that "a separate Designated Construction Project General Aggregate Limit applies to each designated construction project, and that limit is equal to the amount of the General Aggregate Limit shown in the Declarations." Furthermore, the policy makes clear that payments made for a designated construction project "shall not

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reduce the General Aggregate Limit . . . ." Thus, for example,
if there were four projects where accidents occurred during the
policy period, Arch would provide an aggregate of $2 million of
coverage per project for a maximum coverage of $8 million.

Plaintiff's first-layer excess policy, issued by Great
American Assurance Company ("Great American"), provides a $1
million occurrence limit and a matching $1 million aggregate
limit once plaintiff's underlying policy has been exhausted.
Plaintiff argues that this policy provides an aggregate of $1
million of coverage per project during the policy period
regardless of the number of projects.

Defendant issued plaintiff's second-layer excess
policy which provides coverage once the underlying Arch and
Great American policies are exhausted. The policy includes a $4
million per occurrence limit as well as a $4 million aggregate
limit. The parties, as noted above, dispute whether the
aggregate limit is all that will be paid regardless of the
number of projects during the policy period or whether the $4
million aggregate applies to each project during the policy
period.[1]

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1.   Plaintiff's final, third-layer excess policy, issued by
Allied World Assurance Company, is not at issue here. It
contains a $16 million occurrence limit and $16 million
aggregate limit.

III

The court turns to the language of the policy issued
by defendant. Its coverage limitations are described in Item 4
on the declarations page:

> The Limits of Insurance, subject to all the
> terms of this Policy, are:
>   A. $4,000,000 Each Occurrence
>   B. $4,000,000 Other Aggregate(s) Where
>   Applicable
>   . . . .

Section I.A. of the policy includes a following form
endorsement:

> We will pay on behalf of the Insured, the
> "Ultimate Net Loss" in excess of the
> "underlying Insurance" as shown in Item 5.
> of the Declarations, that the Insured
> becomes legally obligated to pay for loss or
> damage to which this insurance applies and
> that takes place in the Coverage Territory.
> Except for the terms, definitions,
> exclusions or limitations of this Policy,
> the coverage provided by this Policy shall
> follow the terms, definitions, conditions
> and exclusions of the applicable First
> Underlying Insurance Policy(ies) shown in
> Item 5.A. of the Declarations.

As such, defendant's policy incorporates the "terms,
definitions, conditions and exclusions" included in the Arch and
Great American policies unless they conflict with those in
defendant's policy.

Section II.A.5 of defendant's policy further states:

> The Limits of Insurance of this Policy will
> apply as follows:

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. . .

5. Subject to paragraphs B.2[2] and B.3[3] above, the Other Aggregate Limit stated in Item 4.B of the Declarations [i.e., $4M] is the most we will pay for all "Ultimate Net Loss" . . . that is subject to an aggregate limit provided by the First Underlying Insurance Policy(ies).[4] The Other Aggregate Limit stated in Item 4.B. applies separately and in the same manner as the aggregate limits provided by the First Underlying Insurance Policy(ies). [emphasis added]

Plaintiff asserts that defendant's aggregate limit should be applied in the same way as the Arch primary policy and its interpretation of the Great American first-layer excess policy. The Arch policy includes a coverage limit per project but does not limit the total amount of coverage across projects. The Great American policy explicitly states that the aggregate limit is the maximum the policy will cover. The following form endorsement provides that "[t]he aggregate limit applies

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2.   Paragraph B.2. states: "If our Limits of Insurance stated in ITEM 4. of the Declarations are less than the total Limits of Insurance stated in ITEM 4. of the Declarations, then our Limits of Insurance shall be that proportion of the 'Ultimate Net Loss' to which our Limits of Insurance apply to the total Limits of Insurance stated in ITEM 4. of the Declarations and apply only in excess of the total Limits of 'Underlying Insurance' scheduled in ITEM 5. of the Declarations."

3.   Paragraph B.3. states: "Subject to Paragraph B.2. above, the Each Occurrence limit stated in ITEM 4.A. of the Declarations is the most we will pay for the 'Ultimate Net Loss' for loss or damages arising out of any one occurrence to which this insurance applies."

4.   The policy provides for an exception that is not relevant.

separately and in the same manner as the aggregate limits

provided" by the first underlying insurance policy. Similarly,

defendant's policy states that the aggregate limit of $4 million

"is the most [the defendant] will pay."

Plaintiff focuses on defendant's policy language in

Section II.A.5 which appears after the language that $4 million

is most that defendant will pay. That later language provides

that the aggregate limit "applies separately and in the same

manner as the aggregate limits provided by the First Underlying

Insurance Policy(ies)." Plaintiff argues that the aggregate

limits of the Great American policy as well as defendant's

policy should apply "separately and in the same manner" as the

primary Arch policy which has no aggregate limit except as to

each specific project. According to plaintiff, the $4 million

aggregate applies to the accidents at both the I-83 and I-78

projects for $8 million in total coverage.

Defendant's policy follows the form of the underlying

Arch and Great American policies. This does not mean that all

the terms, conditions, and liability limits of defendant's

policy are the same as the underlying policies. "A following

form policy has the same terms and conditions as the primary

policy, but has a different liability limit." Kropa v. Gateway

Ford, 974 A.2d 502, 506 n.2 (Pa. Super. Ct. 2009). Furthermore,

"[i]t is well settled that the obligations of following form

excess insurers are defined by the language of the underlying policies, <u>except to the extent that there is a conflict between the two policies, in which case the wording of the excess policy will control.</u>" Lexington Ins. Co. v. W. Pennsylvania Hosp., 318 F. Supp. 2d 270, 274 n.3 (W.D. Pa. 2004), <u>aff'd</u>, 423 F.3d 318 (3d Cir. 2005)(emphasis added). Pennsylvania law is clear that a following form policy can set its own liability limits and include terms that differ from the underlying policy.

While it is undisputed that defendant's policy generally follows plaintiff's primary policy issued by Arch and first-layer excess policy issued by Great American, defendant's following form endorsement has an explicit exception. It provides that "<u>[e]xcept for the terms, definitions, exclusions or limitations of this Policy</u>, the coverage provided by this Policy shall follow" the underlying insurance policies. In addition, the language in defendant's policy applying its general aggregate limit "separately and in the same manner as the aggregate limits provided by" the underlying insurance is subject to a limitation.[5] Defendant's policy states unequivocally "the Other Aggregate Limit stated in Item 4.B of

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5.   Defendant also contends that this language refers to its occurrence limit which matches its overall aggregate limit. It is common for excess policies to contain matching per occurrence and aggregate limits. <u>See, e.g.</u>, <u>AstenJohnson, Inc. v. Columbia Cas. Co.</u>, 562 F.3d 213, 217 (3d Cir. 2009).

the Declarations [i.e., $4M] <u>is the most we will pay for all</u>
<u>'Ultimate Net Loss.'</u>" (emphasis added). Thus, the language of
the policy clearly and unambiguously provides that defendant's
total aggregate limit is $4 million regardless of the number of
construction projects. That is "the most" that defendant will
pay for "all ultimate net loss." The later language which
plaintiff cites does not contradict this aggregate limitation.
It simply describes the policy as form following to the extent
the policy does not explicitly set forth differences from the
underlying policies. Here, the total aggregate limit in
defendant's policy is explicitly different from the total
aggregate limits in the underlying policies.

In <u>Colony Ins. Co. v. Aspen Specialty Ins. Co.</u>, 564 F.
Supp. 3d 343 (D.N.J. 2021), the District Court of New Jersey
reached a similar result. In that case, Aspen Specialty
Insurance Co. ("Aspen") offered a "shared risk" insurance plan
that covered over 200 bars and restaurants. The defendant,
Colony insurance Co. ("Colony"), provided an excess insurance
policy that applied once the coverage provided by Aspen was
exhausted. Although this was not a follow form policy, the
policy uses similar language as defendant's policy. Like
defendant's plan, Aspen's plan included an occurrence limit as
well as a matching aggregate limit of $1 million. Furthermore,
Aspen's plan, like defendant's plan, stated that the aggregate

limit was "the most we will pay . . . for all damages." Id. at
347. Colony sought to apply Aspen's occurrence limit without
restriction.

The court concluded that Colony's interpretation of
the policy language "violates a black-letter principle of
contract interpretation" by disregarding the policy language
which stated that the occurrence limit was subject to the
aggregate limit. Id. at 355-56. Furthermore, the court noted
that Colony's interpretation would "invalidate the 'the most'
language" in the policy "by requiring Aspen to cover more than
$1 million in total liquor liability claims." Id. at 356. The
court held that the plain language of Aspen's policy meant that
Aspen would never have to pay more than $1 million during the
policy period. Id. at 357.

In another case against defendant, JRD Unico, Inc. v.
Starr Indemnity & Liability Co., a New York appellate court
interpreted defendant's follow form excess policy which
contained identical language to defendant's policy here.[6]
167 N.Y.S.3d 784 (App. Div. 1st Dep't 2022). Defendant's policy

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6.   Our Court of Appeals has stated that "the basic rules of
[contract] interpretation[] are well established and do not
differ between New York and Pennsylvania." Pac. Emplrs. Ins.
Co. v. Glob. Reinsurance Corp. of Am., 693 F.3d 417, 426 (3d
Cir. 2012).

included a $5 million occurrence limit as well as a matching $5

million aggregate limit. The court stated:

> [T]he only reasonable way to construe the
> policy language of the Starr policy is that
> it contains a $5 million per location limit
> and a $5 million overall aggregate limit of
> liability. Reading the Starr policy as
> plaintiffs contend it should be read--that
> the $5 million aggregate applied on a per-
> location basis--would produce a windfall of
> approximately half a billion dollars, which
> would not be a reasonable construction.

Id. at 784-85.

Here, plaintiff's interpretation of the contract is

similarly unreasonable. If the court disregarded the language

in defendant's policy that limits aggregate coverage to $4

million, plaintiff would be entitled to double that amount now

to cover any liabilities from the ongoing cases involving two

separate projects. Furthermore, plaintiff's coverage could be

virtually unlimited if it is restricted only by the number of

projects without an aggregate limit to cap total coverage. The

court will not interpret the contract in a manner that creates

an absurd result. See, e.g., Great Am. Ins. Co. v. Honeywell

Int'l, Inc., Civil Action No. 05-857, 2009 U.S. Dist. LEXIS

117683 at *14 (W.D. Pa. Dec. 17, 2009); Washington Twp. Mun.

Auth. v. Am. Arbitration Ass'n, 287 Pa. Super. 78, 429 A.2d 728,

730 (Pa. Super. 1981).

Finally, plaintiff argues that the insurance policy is ambiguous and therefore, under the reasonable expectation doctrine, the policy should be interpreted in its favor. However, the Superior Court of Pennsylvania has explained:

> Our Supreme Court has held that the polestar for determining the parties' intent is the language of the policy itself. This Court has noted that, generally, courts cannot invoke the reasonable expectation doctrine to create an ambiguity where the policy itself is unambiguous. Our Supreme Court has identified only two limited exceptions to this principle: (1) protecting non-commercial insureds from policy terms which are not readily apparent; and (2) protecting non-commercial insureds from deception by insurance agents.

Matcon Diamond, Inc. v. Penn Nat. Ins. Co., 815 A.2d 1109, 1114 (Pa. Super. Ct. 2003) (citations omitted).

The reasonable expectation doctrine does not apply here because the plaintiff is a commercial insured. Focusing on the policy language, the court finds that the policy is not "reasonably susceptible to more than one interpretation" and therefore is not ambiguous. Medical Protective Co. v. Watkins, 198 F.3d 100, 103 (3d Cir. 1999). The court will not look beyond the language of the policy to determine the parties' intent.

Accordingly, the court will grant the motion of the defendant to dismiss plaintiff's complaint for failure to state

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a claim under Rule 12(b)(6) of the Federal Rules of Civil

Procedure.